

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE MINNESOTA DEPARTMENT OF PUBLIC WELFARE

In the Matter of the Contested Case
of Sunshine Villa; Inc. v. Minnesota
Department of Public Welfare.

REPORT OF HEARING EXAMINER

The above-entitled matter came on for hearing before State Hearing Examiner George A. Peck at 9:30 a.m. on June 28, 1978, in the Hearing Room of the Office of Hearing Examiners at Room 300, 1745 University Avenue, in the City of Saint Paul, Count, of Ramsey, State of Minnesota. A written stipulation in this matter was arrived at on January 8, 1979. The final brief was submitted on March 27, 1979.

Paul C. Zerby, Assistant Attorney General, Fourth Floor, Centennial Office Building, Capitol Complex, Saint Paul, Minnesota 55155, appeared on behalf of the Department of Public Welfare. John M. Broeker, Esq. and William J. Wernz, Esq. of the firm of Broeker, Hartfeldt, Hedges & Grant, 2850 Metro Drive, Suite 800, Minneapolis, Minnesota 55420, appeared representing Sunshine Villa, Inc.

Witnesses at the hearing included: Robert J. Rau, Director of the Audit Division of the Department of Public Welfare; Robert Sundberg, Administrator, Sunshine Villa; and John R. Racek, CPA for Sunshine Villa.

Based upon all of the exhibits, testimony, stipulations and briefs filed herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. Sunshine Villa, Inc. is a proprietary nursing home facility located in Mora, Minnesota.

2. This contested case proceeding involves a consolidation of four separate appeals by Sunshine Villa of welfare rate determinations made by DPW pursuant to 12 MCAR Sec. 2.049, on April 20, 1976, July 22, 1976, May 23, 1977 and March 3, 1978. The appeals of the first two determinations were settled prior to hearing. Certain issues involved in the last two appeals were agreed to be disposed of according to judicial determination in similar pending cases. All settlements and agreements are set out in the stipulation dated January 8, 1979, which is a matter of record. Two issues remain for decision: (1) Whether or not certain items within the nursing home are fixtures within the meaning of Minn. Stat. Sec. 256B.42, subd. 2 and (2) the proper application of the "maximum rate limitation" or "regional maximum" of 12 MCAR Sec. 2.049 B.4.b. to Sunshine Villa. Fixtures

3. The meaning of "Fixture", which is not defined by statute or rule is crucial since the term in the statutory definition of "facility". Minn. Stat. Sec. 256B.42, subd 2. defines "facility" as follows:

Subd. 2. -Facility" means the building in which a nursing home is located and all permanent fixtures attached to it. "Facility" does not include the land or any supplies and equipment which are not fixtures.

The definition of "facility" is important since the investment allowance which is the cost of capital or profit allowance for proprietary nursing homes, is computed as a percentage of the value of the facility.

4. The working definition of "fixtures" used by the Department includes within the term those fixed assets which are physically attached to

the building so as to constitute a part thereof. Sunshine Villa argues

that fixtures include all equipment and improvements permanently associated

with the building, by special use or annexation, and attached to it either

physically or constructively.

5. The items which Sunshine Villa claims are fixtures are set out in

Facility Exhibit "AA" which is attached hereto and incorporated herein by

reference. The items in the exhibit are divided into three groups for ease

of reference. The items in Group I includes kitchen equipment and other

items being depreciated by the facility over a ten year period as equipment.

Certain of these items, which are marked by an asterisk in the stipulation,

have been accepted as fixtures by DPW for the purposes of this contested case proceeding. Group II items include items located outside the building,

such as blacktop, sod, curb and gutter, which are being depreciated by the

facility over a useful life of 20 years as land improvements. Group III

items include beds, tables, and chairs which are being depreciated by the

facility over a ten year useful life as equipment. Sunshine Villa is de-

preciating its building over a useful life of 35 years.

6. One item included in Group I is the auxiliary generator that the

facility is required to have as a standby in case of a loss of power. The

generator was lifted into place with a crane and is bolted to the floor.

The exhaust system for the generator passes through the building wall and

the generator has its own transfer switch box. The electrical cable would

have to be severed for the generator to be detached. (Ex. J, K, L, M, J-1 through M-1, J-2 through M-2)

7. Two large, black Vulcan ranges located in the kitchen are placed on specially constructed concrete platforms which were constructed when the

building was built. The ranges are screwed to the wall and attached to plumbing and electrical connections which pass through the concrete platform. (Ex. Q, R, S, T, U, Q-1 through U-1, Q-2 through U-2)

8. The kitchen also contains a steam cooler and a convection oven. Both are directly connected to the water, gas and electrical service and could not be easily disconnected without a serviceman. (Ex. N, O, P, N-3, p-1, N-1, O-1, N-2, O-2)

9. Two large water heaters are located in the basement of the facility,

one a large blue unit and the other a smaller white unit. Both are Plumber

directly into the water systems and have direct electrical connections.

(Ex. G, G-1, G-2, H, H-1) A commercial water softener is also located in

the basement which was also connected to the water system by a plumber and Which softens all of the water in the building. (Ex. I, I-1, I-2)

10. A water heater booster is attached to the large stainless steel scullery sink located in the kitchen. The function of the booster is to increase the temperature of the water. The sink was custom designed for the facility and the water was designed to fit the sink. The booster has direct electrical and plumbing connections. (Ex. C, C-1)

11. The facility also contains a large commercial clothes washer which is approximately three times larger than the largest residential washer. The washer is bolted to a specially poured slab of concrete which acts as a catch basin. The washer is directly connected to water and electrical supplies. (Ex. E, F, E-1, F-1)

12. Metal parallel exercise bars are located in the facility's physical therapy room. They are bolted to the floor and have been in place since the facility was constructed. (Ex. AA, Item b. 11., 14. and 15.)

13. An ice maker is located in the northwest corner of the dining room. The plumbing and electrical connections to the ice maker were made through the wall between the dining room and the kitchen. The plumbing is a direct connection rather than being easily detachable. (Ex. AA, Item b. 12. - 16.)

14. A Whirlpool wall air conditioner is located in the main business office of the facility. The air conditioner is placed into a hole in the wall which was cut when the building was constructed. The air conditioner is supported by the wall and is inverted into a sleeve to which it is screwed.

15. Drapes are located throughout the facility. They are attached to drapery rods which are inverted and screwed into the window frame. Tabs on the rods permit attachment to the drapes. The drapes are custom made to fit within the perimeter of the windows.

16. In the resident rooms, health care beds are separated by cubicle curtains. Reads on the curtains are attached to dollies which run on a track located on the ceiling of the room. The track is bolted to the ceiling.

Regional Maximums

17. Sunshine Villa welfare per diem rate was limited for the fiscal year ending 9/30/77 and for the first three months of the fiscal year ending 9/30/78 by application of the "regional maximum" rate limitation set out in 12 MCAR Sec. 2.049 B.4.

18. 12 MCAR Sec. 2.049 B.4. reads as follows:

b. Maximum rate. Individual welfare rates will be subject to a maximum of 125 per cent of regional average costs plus known cost changes exclusive of this limitation and flat rates under B.3.e. Regions will be those areas designated by the Governor for regional planning and economic-development purposes. Regions may be combined when deemed appropriate by the commissioner as announced through policy bulletins. The regional averages will be calculated separately for proprietary, non-proprietary and hospital-attached facilities except the regional average costs for hospital-attached facilities shall be included

in the regional average calculation for non-proprietary free-standing facilities. The maximum-rate limitations will be adjusted annually through policy bulletins. The regional averages will be determined by the commissionerr, using all available information from reports that indicate a fiscal-year end during a calendar year and will be applied to rates that become effective during the second

succeeding calendar year. Facilities that have a non-calendar-year end and have been previously subject to the maximum rates may adjust the rates to the new maximum rates if previously justified by the reports.

19. That any of the foregoing Findings of Fact which should properly be termed Conclusions are hereby adopted as such.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS

1. That the Commissioner of Public Welfare and the Hearing Examiner have jurisdiction of this matter pursuant to 12 MCAP Sec. 2.049 B.5. and Minn. Stat. Sec. 15.052; that the Department of Public Welfare gave proper notice of the hearing in this matter; that the Department has authority to take the action proposed; and that the Department has fulfilled all relevant substantive and procedural requirements of law or rule.

2. That the burden of proof in this proceeding is upon Sunshine Villa, Inc. pursuant to 9 MCAR Sec. 2.217 C.5.

3. That the following items are fixtures within the meaning of Minn. Stat. Sec. 256B.42, subd. 2:

a. Those Group I items stipulated as fixtures by the Department as indicated in Facility Ex. "AA".

b. The other following Group I items: The auxiliary generator, the two Vulcan ranges, the two water heaters, the water softener, the water heater booster, the commercial clothes washer, and the wall air conditioner.

4. That the following items are not fixtures within the meaning of Minn. Stat. Sec. 256B.42, subd. 2:

a. All of the items listed under Group II on Facility Ex. "AA".

b. All of the items listed under Group III on Facility Ex. "AA".

c. The following Group I items: The steam cooler, the convection oven, the parallel exercise bars, the ice raker, the drapes, and the cubicle curtains.

5. That the Department's failure to adopt a rule to implement Minn. Laws 1976, Ch. 282, Sec. 7, subd. 1 does not repeal or invalidate 12 MCAR

Sec. 2.049 B.4.b., and that the rule does not clearly conflict with the statute.

C. That Sunshine Villa, Inc. has not shown that 12 MCAR Sec. 2.049 conflicts with 42 U.S.C. Sec. 1396a(a)(13)(E) so as to invalidate the state rule and that the proper forum for such a determination is a court of law.

7. That neither the Hearing Examiner nor the Commissioner has authority to determine that a state rule is unconstitutional and therefore invalid.

8. That the investment allowance is properly includable as a "cost"

and is therefore subject to 12 MCAR Sec. 2.049 B.4.b.

9. That the Memorardum attached hereto is incorporated by reference into these Conclusions.

10. That, pursuant to 9 MCAR Sec. 2.218 C., the Commissioner shall serve his final decision on this matter upon the Hearing Examiner as well as the parties in this matter.

Based upon the foregoing Conclusions, the Hearing Examiner makes the following:

RECOMMENDATIONS

It is hereby respectfully recommended that the Commissioner issue his final Order in this matter based upon the foregoing Conclusions.

Dated: April 6, 1979.

GEORGE A. BECK
State Hearing Examiner

N O T I C E

This Report is a recommendation, not a final decision,, 'he Commissioner of Public Welfare will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. Sec. 15.0421, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the Commissioner of Public Welfare to ascertain the procedure for filing exceptions or presenting argument.

MEMORANDUM

The case of Abex Corporation v. Commissioner of Taxation, 295 Minn. 445, 207 N.W.2d 37 (1973) is our Supreme Court's most recent summary of the common law of fixtures. The court summarized the law as follows:

The cases indicate:

(a) To be a fixture, the property must be annexed in either an actual or a constructive manner. An object is constructively annexed where (1) it has been physically annexed but may be separated for a temporary purpose, e.g., for repair; or (2) although never physically annexed, the object is an essential part of something that is annexed, e.g. keys in a door; or (3) the object is ponderous and annexed to the land only by force of gravitation. . . . (b) There must also be an intent to make the property a permanent accession to the freehold.

207 N.W.2d 43-44. The court suggested that the items claimed to be fixtures

must be necessary for the business involved, installed for the item's useful life, and intended not to be removed.

Abex involved a property tax appeal and the court was careful to point

out that its decision in the case was limited to a tax interpretation.

Similarly, many cases point out that its decision on fixtures is limited

to the particular subject area involved, e.g. landlord-tenant law. it is

also commonly observed that it is impossible to give a definition of fixtures

which may be regarded as of universal application and that, ultimately, the

decision of whether or not an article is a fixture must turn on the facts and

circumstances of the particular case.

The term "fixtures" as used in the statute, in the absence of a defini-

tion by statute or rule, must be presumed to have the same meaning which

has been given to that term by the common law developed by our Supreme Court.

Accordingly, the conclusions herein result from measuring the Abex criteria

against the particular facts of this contested case proceeding. It is con-

cluded that since the term "fixture" by definition means an item which is

permanently attached, the language of the statute ("all permanent fixtures

attached") is not more restrictive than the common law definition. The

Department's interpretation, insofar as it excludes "constructive" attach-

ment, is not consistent with the case law.

Sunshine Villa urges an interpretation a good deal broader than that

set out in the common law in that it seeks to include items of equipment

such as beds, geriatric chairs, or tables on the theory that these items,

while not attached, are an essential part of a nursing home. The facility

also suggests that since these items are required by federal or state law,

that they are therefore as attached to the building as is ponderous equip-

ment. This argument does not, however, have support in Minnesota law.

it may be good policy to include patient care items within the definition of

fixtures, the law does not now do so, and! Such a change must be accomplished

legislatively, or through rulemaking if such authority exist,;.

Accordingly, the items in Group II of Ex. "A1" are found not to be fixtures since they are attached to the land but are not attached to the

nursing home building either actually or constructively within the meaning of Abex. Likewise, the Group III items are "equipment which are not fixtures" because they are not attached under the reasoning of Abex.

In regard to the remaining items found to be fixtures, they are found to individually have such characteristics so that it can be said that they are actually attached, or an essential part of something actually attached, or ponderous.

Sunshine Villa states that Minn. Laws 1976, Ch. 282, Sec. 7, subd. 1 required the establishment of separate limitations on reimbursement to nursing homes for direct and indirect costs. Since, Sunshine Villa argues, Rule 49 B.4.b. imposes a single limitation, it is clearly in conflict with the statute and is therefore repealed pursuant to Minn. Laws 1976, Ch. 282, Sec. 1, subd. 2.

Specifically, Minn. Laws 1976, Ch. 282, Sec. 7 requires DPW to adopt a rule to establish separate limitations on direct and indirect costs. DPW has twice proceeded to hearing with such a proposed rule, but has not yet successfully adopted such a rule. A fair reading of the statute discloses that the legislature intended that tie separate limitations be implemented by DPW by rule rather than by the statute itself. The legislature stated that it did not intend to repeal any existing rule unless it was clearly in conflict with the statute. That is not the case here.

The respondent also challenges the regional maximum limitation on the grounds that it conflicts with the federal requirement, stated at 42 U.S.C. Sec. 1396 a(a) (13) (E) that payment under the state plan for medical assistance be on a reasonable cost related basis. Sunshine Villa believes that the regional maximum is imposed without regard to whether or not an efficiently operated facility is reimbursed in full for actual allowable costs.

The difficult question is how one arrives at "reasonable costs". DPW states that Rule 49 as a whole must be evaluated and measured against the federal requirement and not just the regional maximum aspect of the rule. At least one HEW official has found Rule 49 to be in compliance with the federal law. The complex determination of whether Rule 49 reimbursement

squares with federal law is also a subject of litigation in federal district court (Minnesota Association of Health Care Facilities, Inc. v. Minnesota Department of Public Welfare) before judge Devitt which would appear to be a more suitable forum for resolution of this question. As Sunshine Villa noted at page 28 of its Memorandum it has standing to seek judicial enforcement of the federal requirements.

The facility's argument concerning an unconstitutional taking is also addressed to the wrong forum. Neither agency heads nor hearing examiners have authority to determine the constitutionality of legislation or rules. See, K. Davis, Administrative Law Treatise, Sec. 20.04 (1958 and Supp. 1976) Vol. III at p. 74.

Lastly, the facility argues that the regional maximum cannot properly be applied to the investment allowance since the allowance is not properly includable as a cost which can be limited. DPW points out, however, that historically the earnings allowance and the minimum cost of capital allowance,

the predecessors to the investment allowance, have been includable as indirect

costs. These items were included in Rule 49 under the "Reasonable Cost Principles" section along with other costs such as salaries or administrative expense. There is no indication that the legislature intended, through the passage of Minn. Laws 1977, Ch. 282, to alter this interpretation which has been consistently in effect since 1973.

G.A.B.